

No. 20324

In the

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CARPENTERS LOCAL NO. 2133, UNITED BROTHER-
HOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; and SALEM BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO,
Respondents.

**On Petition for Enforcement of an Order
of the National Labor Relations Board**

RESPONDENTS' BRIEF

DONALD S. RICHARDSON,
GREEN, RICHARDSON & GRISWOLD,
1003 Corbett Building,
Portland, Oregon 97204,
Attorneys for Respondents.

FILED

DEC 3 1965

FRANK H. SCHMID, CLERK

INDEX

	PAGE
Jurisdiction	1
Statement of the Case	2
I. The Board's Findings of Fact	2
A. Interstate Commerce	2
B. Respondents did not request Ryan to sign a contract....	3
II. The Board's Conclusions and Order	4
Argument	5
I. The Board Improperly Exercised Jurisdiction	5
II. Finding of Violation of Section 8(b)(7)(C) of the Act Not Supported by Substantial Evidence	7
Conclusion	9
Certificate	10

INDEX OF AUTHORITIES

CASES

	PAGE
Calumet Contractors Association, 133 NLRB 512	8
Connecticut Board of State Labor Relations (Norwalk Motel Inn), 136 NLRB 1090, 1091	5
Connecticut Board of State Labor Relations (New Englander Motor Hotel), 136 NLRB 1092	5
Houston Building & Construction Trades Council, 136 NLRB 321	8
Smitley v. N.L.R.B., 327 F. 2d 351, 353	8
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 95 L. ed. 456	7

STATUTE

National Labor Relations Act, as amended, 29 U.S.C., Section 151, et seq.	1
Section 8 (b) (7) (C)	2, 8, 9
Section 10 (e)	1

No. 20324

In the

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CARPENTERS LOCAL NO. 2133, UNITED BROTHER-
HOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; and SALEM BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO,
Respondents.

**On Petition for Enforcement of an Order
of the National Labor Relations Board**

RESPONDENTS' BRIEF

JURISDICTION

This case is before the Court because of the Board's petition for enforcement of its order, issued against Respondents on April 1, 1965. The proceeding in this Court is based upon Section 10 (e) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, et seq.). The respondent Labor Organizations contend that the Board improperly exercised jurisdiction under its standards.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Respondents contend, first, that the Board improperly asserted its jurisdiction in this case, and, second, that the Board's Findings and Conclusions to the effect that the Respondents violated Section 8 (b) (7) (C) of the Act are not supported by substantial evidence. We consider it necessary that certain evidentiary matters, which the Board did not include in its statement of the case, but which support our position, be called to the Court's attention.

A. Interstate Commerce

The Board states that Leonard Ryan and Swept Wing Motel, Inc., constitute a single employer for jurisdictional purposes, and refers to the two, collectively, as "Ryan" (Board's Br., p. 3). While it is correct that Leonard Ryan testified that he is the sole owner of the corporation, it should be noted that he also testified that the corporation, Swept Wing Motel, Inc., was the employer of the employees engaged in the motel construction (Tr. 91). He also testified that he intends to continue to own and operate the motel (Tr. 86).

The Board found that Ryan had purchased \$54,788.91 worth of materials which had originated outside of Oregon, and the Board proceeded to assert jurisdiction

on the theory that its non-retail category should be applied and that there was an indirect inflow of material in excess of the value of \$50,000.00 annually. Respondents contend that the Board should have applied its retail category, which here would require a showing of probable annual volume of business of at least \$500,000.00 and certain other elements which we will discuss in our argument.

Of the \$54,788.91 worth of materials, about half of the total dollar amount represents furniture or furnishings for the motel. These include such items as lamps, chairs and tables, worth \$13,866.96 (GCX 2A-2D); 34 television sets worth \$3,910 (Tr. 20); furnishings and supplies worth \$4,586.20 (GDX 7), a carpet worth \$7,727 (Tr. 52), and the lobby furniture worth \$865.00 (Tr. 55). Respondents contend that all of these items should not have been counted if the Board's non-retail jurisdictional standard is to be used, because they are not construction materials, but, according to Mr. Krut-singer's testimony, are items normally supplied by the motel's owner (Tr. 130).

B. Respondents did not request Ryan to sign a contract.

We realize that the testimony is in conflict on this point, but we submit that the Trial Examiner and the Board should have credited the testimony of Mr. Krut-singer in this regard (Tr. 126), rather than that of Mr.

Ryan and Mr. Blair. Supporting Mr. Krutsinger's testimony is the concession by Mr. Ryan that no contract had ever been presented to him by Respondents (Tr. 93). Both Mr. Krutsinger and Mr. Westergard testified that if the employer had met the area standards for wages and fringe benefits, the picketing would have been terminated (Tr. 130-131, 135). Substantial differentials between the wage rates observed by the employer (Tr. 90-91) and the area wage rates referred to by Respondents (Tr. 127, 134) existed. Also, the employer provides no health and welfare or pension benefits (Tr. 91), while both the Carpenters' and the Laborers' area conditions include payments for health and welfare coverage and pensions (Tr. 127-128; Tr. 134-135).

II. The Board's Conclusions and Order

Respondents contend that the Board's order should not be enforced because

(1) The Board should not have asserted jurisdiction under its own standards, and

(2) The evidence does not support the Board's finding that the picketing was for the purpose of obtaining recognition from the employer.

ARGUMENT

I. The Board Improperly Exercised Jurisdiction

We realize that the minimum dollar amounts for inflow-outflow, or gross volume of business which the Board requires to be met before it asserts jurisdiction, are imposed by the Board, itself. However, we contend that, since the Board has adopted these standards, a substantial departure from the application of these standards by the Board is arbitrary and capricious.

While Mr. Ryan ordinarily is a home builder in the area of Salem, Oregon (Tr. 6), for the purposes of this case, we are concerned with his activities in connection with a motel at Albany, Oregon. This motel has been constructed through a wholly-owned corporation called "Swept Wing Motel, Inc." Since it appeared that Mr. Ryan is not engaged regularly in the motel construction business, but that he constructed this motel in order to continue to operate it, we contend that the appropriate jurisdictional standards would be the Board's retail category. This standard requires a gross annual volume of business of at least \$500,000, and is the standard used by the Board for hotels and motels (Connecticut Board of State Labor Relations (Norwalk Motel Inn) 136 NLRB 1090, 1091); (Connecticut Board of State Labor Relations (New Englander Motor Hotel), 136 NLRB

1092). Under this standard, as shown by the cases cited, it is also required that it be established that more than twenty-five per cent of the guests are "transients". In the present case, no evidence was offered with respect to the probable annual gross revenue or with respect to the probable conditions with respect to permanency of residents by potential guests.

Respondents also contend that, even under the non-retail jurisdictional standard, the Board should not have asserted jurisdiction. The reason for this is that we submit that all of the items which normally would be considered as furniture or furnishings of the motel should not have been included in computing the amount of inflow. If all of such items to which we have referred in our statement of the case are excluded, the dollar amount of inflow would be reduced by about one-half, and the \$50,000 minimum would not be met.

With respect to the assertion of jurisdiction, the Respondents contend simply that the Board should be consistent. This means that, first, since this is actually a motel operation, the retail standard should have been applied. However, if the non-retail standard is to be used, then certainly only the cost of those items normally used in construction and originating from outside the State of Oregon should have been counted.

II. Finding of Violation of Section 8 (b) (7) (C) of the Act Not Supported by Substantial Evidence.

The picketing involved in this case was done with a banner carrying a legend stating that Ryan was "non-union" and that there was no dispute with any other contractor. Prior to the picketing, Mr. Krutsinger had engaged in a conversation with Mr. Ryan at the job site, but Mr. Ryan did not claim that Mr. Krutsinger asked him to sign a contract at that time (Tr. 66-68). Subsequent to the commencement of picketing, all contacts were initiated either by Mr. Ryan or his representative, Mr. Blair. Mr. Krutsinger denied that he had asked Mr. Ryan to sign a contract (Tr. 126), and he also testified that had the employer observed area wage standards and fringe benefits, the picketing would have terminated (Tr. 130-131). Mr. Westergard also testified that in his conversation with Mr. Ryan and Mr. Blair he did not ask that a contract be signed (Tr. 133-134).

We submit that the factors above mentioned obviously detract from the weight of any evidence which would support the Board's findings and conclusions. We submit, therefore, that under the rule established by the Supreme Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L. ed. 456, these matters must be taken into consideration. When taken into consideration, we contend that the entire record does not provide

substantial evidence to support the Board findings and conclusions.

We contend that here it was incumbent upon the General Counsel to prove that the Respondents were picketing for an immediate object of recognition or organization. As this Court has stated in *Smitley v. N.L.R.B.*, 327 F. 2d 351, 353,

“Unless picketing has as an object ‘recognition or organization,’ it is not prohibited by Section 8 (b) (7) (C) of the Act.”

In support of our contention that the Respondents were entitled to picket to publicize the fact that the employer did not observe area standards with respect to wage rates and fringe benefits, we rely upon the Board’s decisions in *Calumet Contractors Association*, 133 NLRB 512, and *Houston Building & Construction Trades Council*, 136 NLRB 321.

In *Calumet Contractors Association* (supra), 133 NLRB 512, the Board stated as follows:

“We hold that Respondent’s admitted objective to require the Association and DeJong to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining. A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnor-

mal working conditions are eliminated from area considerations. We are of the opinion that Section 8(b)(4)(C) does not forbid such an objective.”

Since in the present case the Respondents never presented a contract to the employer, denied that they had asked him to sign one, and would have terminated the picketing had area standards for wages and fringe benefits been observed by the employer, we submit that the Board’s finding of a violation of Section 8 (b) (7) (C) is not supported by substantial evidence.

CONCLUSION

We respectfully submit that the Court should deny enforcement of the Board’s order.

DONALD S. RICHARDSON

GREEN, RICHARDSON & GRISWOLD

Attorneys for Respondents

CERTIFICATE

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with these rules.

DONALD S. RICHARDSON

Of Attorney for Respondents